MP Factors Sdn Bhd v SuangYan Projects Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO: D1-22-372 OF 1998
VINCENT NG KIM KHOAY J
16 NOVEMBER 2006

Contract — Terms and conditions — Notice — Whether the plaintiff had given proper and valid notice under Factoring Agreement and to the second, third and fourth defendants in accordance with the terms of the Continuing Guarantee cum Indemnity before exercising any right of repurchase or recourse of the purchase invoices.

Contract — Construction of terms of contract — Estoppel — No contemporaneous protest to demand notice — Whether by the defendants' silence they are estopped from now raising this challenge

Civil procedure — Pleadings — Statement of claim — Whether parties should only plead material facts and not evidence in their pleadings

Contract — Terms and conditions — Invoices with statement that any objection to the bills or its items must be notified in writing within 14 days of its receipt — Whether failure to object within stipulated period estopped the defendants from denying the debt

Contract — Certificate of Indebtedness — Defendants failed to condescend upon any particulars and, neither did they show any manifest error on the face of the Certificate of Indebtedness — Whether the defendant's bound by the contents of the Certificate

Civil Procedure — Counter claim — Did not pursue the payment of the alleged sum due until after the filing of this action — Whether would negate the first defendant's counterclaim

Evidence — Adverse inference — Material witness — Whether failure to call material witness is fatal to the suit — Evidence Act 1950 s114 (g)

One Invescor Ventures Sdn Bhd was the main contractor appointed to carry out a construction project. The main contractor appointed the first defendant as the sub-contractor for the project. The first defendant needed funds to complete the project and turned to the plaintiff for the same. The plaintiff offered a factoring facility to the first defendant which was accepted by the first defendant. On 16th December 1996, the plaintiff entered into a Factoring Agreement with the

first defendant whereby the plaintiff (the purchaser) was assigned the debts and invoices (the debt receivable) due to the first defendant (the Vendor) from the main contractor. The second, third and fourth defendants executed a Letter of Guarantee and Indemnity to secure the sums due to the plaintiff on the Factoring Agreement. The main contractor was notified of the said Factoring Agreement. However, the main contractor defaulted in payment when the invoices became due. As no payment was forthcoming from the main contractor, the plaintiff exercised its rights under the said factoring agreement requiring the first defendant to repurchase the debts outstanding from the main contractor. The requisite notices to repurchase the debts under cl 10 of the factoring agreement was sent by the plaintiff's solicitors to the first defendant, and subsequently the letters of demand was also sent vide registered post to the first defendant and to the second, third and fourth defendants. The plaintiff took out proceedings and obtained judgment against the main contractor. The main contractor has since been wound up. The judgment sum remained unsettled. The plaintiff claimed against the defendants, jointly and severally, the sum of RM965,573.60 as at 31 January 1998 together with interest at the rate of 12.25% per annum commencing from 1 February 1998 until full realization and costs. The defendants insisted that all outstanding sums ought to be recovered from the main contractor and not from them since under the said Factoring Agreement, all debts due to the first defendant from the main contractor have been assigned to the plaintiff. The first defendant on the other hand counter-claimed against the plaintiff for the sum of RM231,454.12 together with interests on the ground of the alleged failure of the plaintiff to pay the first defendant the said sum in respect of the initial payment for invoice No. 005/97 (Schedule 006, being the 6th Schedule). The issues for the Court's determination were: (1) whether the plaintiff had given proper and valid notice to the first defendant under cl 10(1) of the Factoring Agreement and to the second, third and fourth defendants in accordance with the terms of the Continuing Guarantee cum Indemnity before exercising any right of repurchase or recourse of the purchase invoices; (ii) whether the plaintiff is entitled to the sum claimed in the statement of claim against all the defendants; and (iii) whether the first defendant is entitled to counter-claim against the plaintiff in respect of invoice No. 005/97 under the 6th Schedule.

Held, allowing plaintiff's claim with costs and dismissing first defendant's counter-claim with costs:

(1) The notice for recourse or repurchase of the invoices was given collectively with the third invoice vide the letter dated 9th October 1997. Further, in his testimony during cross-examination, DW1 confirmed that he received all the demand letters dated 6th February 1998 and 7th February 1998 respectively. In the circumstances defendants did receive the notice to repurchase issued by the plaintiff's solicitors. This notice to repurchase was further buttressed by notices dated 6th February 1998 and 7th February 1998 which demanded payments for the sum of RM965,573.60 as at 31st January 1998 together with interest thereon within 14 days from the date of the notice of demand (see para 4).

(2) Notice of 9th October 1997 is in fact a good notice to repurchase and is in compliance with cl 10 (1) of the Factoring Agreement. It is crucial to note

cl 10(2) and (3) imposes a clear obligation on the part of the first defendant that 'upon receipt of the notice the Vendor must without question, purchase that debt from the purchaser at a repurchase price that would fully indemnify the purchaser against all payments, expenses, costs and consequential losses.' Further, under cl 10(i), (g) and (h), the first defendant shall be liable 'if the main contractor (becomes insolvent or) fails promptly to pay that purchased debt when it becomes due'. Notably, cl 10(1) imposes no obligation upon the purchaser (the plaintiff) to state the particulars and details required by the defendants (see para 11).

(3) In any event, there was no contemporaneous protest in this regard by the defendants. The notice of 9th October 1997, which was followed by all the four demand notices addressed to the defendants were sent by the plaintiff's solicitors to the last known addresses of each of the defendants. Thus, by the defendants' silence they are estopped from now raising this challenge as the plaintiff was lulled into the belief that the defendants did not intend to challenge the existence of a demand to repurchase the debt, or the correctness of the amount owed by the defendants under the Factoring Agreement (see para 11).

(4) It is trite law that parties should only plead material facts and not evidence in their pleadings. The plaintiff's claim has been adequately pleaded in the statement of claim as read with the reply and defence to the counter-claim (see O 18 r 7 of the Rules of the High Court 1980 and *Superintendent of Land and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185) (see para 15).

(5) Through PW1's evidence, copies of invoices and certificate of indebtedness tendered by the plaintiff to prove the sums outstanding and payable to the plaintiff by the defendants. Each of the invoices also bear a clear statement that any objection to the bills or its items must be notified to them in writing within 14 days of its receipt, failing which the bills would be deemed final and conclusive against the main contractor. Consequently, these invoices are deemed good for payment as there was no objection from the main contractor within the stipulated period. More importantly, the plaintiff had acted to its detriment in releasing the initial payments to the first defendant based on the aforesaid invoices. The defendants ought now to be estopped from stating that they do not owe the plaintiff the sum claimed or any other sums [see *Boustead Trading [1985] Sdn Bhd v Arab Malaysian Merchant Bank Sdn Bhd* [1995] 3 MLJ 331; *Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd* [1996] 2 MLJ 251; *Chong Yoong Choy v UOL Factoring Sdn Bhd* [1996] 2 CLJ 605] (see para 19).

(6) The defendants failed to condescend upon any particulars as to the basis of their dispute on the sums claimed by the plaintiff. And, neither did they show in any manner, any manifest error on the face of the Certificate of Indebtedness. Hence, they are bound by the contents of the Certificate (see *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363] (see para 19).

(7) The first defendant's conduct in not complaining to the plaintiff about the non-payment, and in sitting idle and not pursuing the payment of the alleged sum due to it until after the filing of this action, would negate the first defendant's counterclaim. It is puzzling to observe why the first defendants chose to ignore pursuing the sum allegedly due to it (see para 21).

(8) The second defendant did not give evidence for himself or on behalf of the other defendants, nor was he called as a witness in the trial on this aspect of the case which has a relevant bearing to the court's determination on liability. In the circumstances the Court may properly and judicially infer that if this witness had been made available and had the documents been tendered, they would have offered evidence adverse to the defendants' case. As such, the adverse inference provision under s 114(g) of the Evidence Act 1950 is invoked against the defendants (see para 21).

[Bahasa Malaysia summary

Invescor Ventures Sdn Bhd (kontraktor utama) adalah kontraktor utama yang dilantik untuk menjalankan projek pembinaan. Kontraktor utama telah melantik defendan pertama sebagai kontraktor kecil untuk projek tersebut. Defendan pertama memerlukan modal bagi menyempurnakan projek tersebut dan telah pergi kepada plaintif untuk tujuan tersebut. Plaintif telah menawarkan kemudahan pemfaktoran kepada defendan pertama, yang telah diterima oleh defendan pertama. Pada 16 Disember 1996, plaintif telah memasuki Perjanjian Pemfaktoran dengan defendan pertama dimana plaintif (Pembeli) telah diserahkanhak hutang-hutang dan invois-invois (hutang yang diterima) yang tertunggak kepada defendan pertama (pembeli) daripada kontraktor utama. Defendan kedua, ketiga dan keempat telah melaksanakan suratan jaminan dan indemniti (Tanggung Rugi) untuk menjamin jumlah-jumlah tertunggak kepada plaintif ke atas Perjanjian Pemfaktoran. Walaubagaimanapun, kontraktor utama telah memungkiri pembayaran untuk invois-invois yang sepatutnya dibayar. Memandangkan tiada bayaran diterima daripada kontraktor utama, plantif telah menggunakan hak-haknya di bawah perjanjian pemfaktoran tersebut yang memerlukan defendan pertama untuk membeli semula hutang-hutang yang tertunggak daripada kontraktor utama. Notis-notis diperlukan untuk pembelian semula hutamg-hutang di bawah klausa 10 perjanjian pemfaktoran telah dihantar oleh peguamcara plaintif kepada defendan pertama, dan setelah itu surat-surat tuntutan juga dihantar melalui pos berdaftar kepada defendan pertama dan kepada defendan-defendan kedua, ketiga dan keempat. Plaintif telah memulakan prosiding dan memperolehi penghakiman terhadap kontraktor utama. Kontraktor utama kemudiannya telah digulungkan. Jumlah Penghakiman masih lagi belum dibayar. Plaintif menuntut daripada defendan-defendan, secara bersesama dan berasingan, jumlah sebanyak RM965,573.60 setakat 31 Januari 1998 bersama faedah pada kadar 12.25% setahun bermula dari 1 Februari 1998 sehingga penyelesaian sepenuhnya dan kos. Defendan-defendan menegaskan bahawa kesemua jumlah-jumlah yang tertunggak harus diperolehi semula daripada kontraktor utama dan bukan daripada mereka memandangkan di bawah Perjanjian Pemfaktoran, kesemua hutang-hutang tertunggak kepada defendan pertama daripada kontraktor utama telah diserahhak kepada plaintif. Defendan pertama pada masa yang sama telah membuat tuntutan

balas terhadap plaintif untuk jumlah RM231,454.12 bersama dengan faedah atas dakwaan bahawa kegagalan plaintif untuk membayar defendan pertama jumlah tersebut berkaitan bayaran pendahuluan bagi invois bernombor 005/97 (Jadual 006, yang merupakan Jadual Keenam). Isu-isu untuk ditentukan oleh mahkamah adalah: (1) sama ada plaintif telah memberikan notis yang betul dan sah kepada defendan pertama di bawah kl 10(1) Perjanjian Pemfaktoran dan kepada defendan-defendan kedua, ketiga dan keempat mengikut terma-terma Jaminan Berterusan dan Indemniti (Tanggung Rugi) sebelum menggunakan sebarang hak untuk belian semula atau mendapatkan semula Invois-invois Belian; (ii) sama ada plaintif berhak kepada jumlah yang dituntut dalam pernyataan tuntutan terhadap kesemua defendan; dan (iii) sama ada defendan pertama berhak untuk membuat tuntutan balas terhadap plaintif berkenaan invois bernombor 005/97 di bawah Jadual Keenam.

Diputuskan, membenarkan tuntutan Plaintif dan menolak tuntutan balas Defendan Pertama dengan kos:

(1) Notis untuk mendapatkan semula atau belian semula invois-invois diberikan bersama invois ketiga melalui surat bertarikh 9 Oktober 1997. Selanjutnya, dalam keterangan beliau semasa permeriksaan balas, DW1 mengesahkan bahawa beliau telah menerima kesemua surat tuntutan masing-masing bertarikh 6hb Februari 1998 dan 7hb Februari 1998. Dalam kesemua keadaan, defendan-defendan telah menerima notis untuk belian semula yang dikeluarkan oleh peguamcara plaintif. Notis untuk belian semula ini selanjutnya telah disokong oleh notis-notis bertarikh 6hb Februari 1998 dan 7hb Februari 1998 yang menuntut bayaran-bayaran untuk jumlah sebanyak RM965,573.60 setakat 31 Januari 1998 bersama faedah keatasnya dalam masa 14 hari daripada tarikh notis tuntutan (lihat perenggan 4).

(2) Notis 9 Oktober 1997 adalah notis yang sempurna untuk belian semula dan menepati kl 10(1) Perjanjian Pemfaktoran. Adalah penting untuk diperhatikan bahawa kl 10(2) dan (3) mengenakan kewajipan yang jelas dipihak defendan pertama untuk 'selepas menerima notis penjual hendaklah tanpa sebarang persoalan, membeli hutang tersebut daripada pembeli pada harga belian semula yang akan melepaskan tanggungan pembeli terhadap keseluruhan bayaran-bayaran, perbelanjaan-perbelanjaan, kos-kos dan kerugian-kerugian berbangkit'. Selanjutnya, di bawah kl 10(i)(g) dan (h) defendan pertama harus bertanggungjawab 'jika kontraktor utama (menjadi tidak berupaya untuk membayar hutang atau) gagal membayar serta-merta hutang yang telah dibeli bila ia telah tertunggak'. Lebih-lebih lagi, kl 10(1) tidak mengenakan sebarang kewajipan ke atas pembeli (plaintif) untuk menyatakan butiran-butiran dan sebarang perincian yang diperlukan oleh defendan-defendan (lihat perenggan 11).

(3) Dalam setiap keadaan, tiada protes semasa dalam konteks ini oleh Defendan-defendan. Notis bertarikh 9hb Oktober 1997, yang diikuti oleh kesemua empat notis-notis tuntutan yang dialamatkan kepada defendan-defendan, telah dihantar oleh peguamcara plaintif ke alamat-alamat terakhir defendan-defendan yang diketahuinya. Oleh itu, sifat berdiam diri

defendan-defendan mereka telah diestop dari membangkitkan cabaran baru sekarang kerana plaintif telah didorong untuk mempercayai bahawa defendan-defendan tidak berniat untuk mencabar kewujudan tuntutan untuk belian semula hutang, atau ketepatan jumlah kepunyaan defendan-defendan di bawah Perjanjian Pemfaktoran (lihat perenggan 11).

(4) Adalah menjadi undang-undang biasa bahawa pihak-pihak hendaklah memplidkan fakta-fakta material dan bukan keterangan dalam pliding-pliding mereka. Tuntutan plaintif telah diplidkan secukupnya dalam pernyataan tuntutan sebagaimana dibaca dengan Balasan dan Pembelaan kepada Tuntutan Balas (Lihat A18 k 7 *Kaedah-kaedah Mahkamah Tinggi 1980* dan *Superintendent of Land and Surveys (4th Div) & seorang lagi v Hamit bin Matusin & Ors* [1994] 3 MLJ 185) (lihat perenggan 15).

(5) Melalui keterangan saksi PW1, salinan-salinan invois dan sijil keberhutangan yang dikemukakan oleh plaintif membuktikan jumlah-jumlah tertunggak dan yang perlu dibayar kepada plaintif oleh defendan-defendan. Setiap daripada invois-invois hendaklah dimaklumkan kepada mereka secara bertulis dalam masa empat belas (14) hari dari tarikh penerimaan, yang mana kegagalan berbuat demikian akan dianggap menjadi bil-bil terakhir dan muktamad terhadap kontraktor utama. Akibatnya, invois-invois ini akan dianggap sempurna untuk pembayaran memandangkan tiada bantahan daripada kontraktor utama dalam tempoh yang ditetapkan. Lebih penting lagi, plaintif telah bertindak di atas kerugiannya bagi mengeluarkan bayaran pendahuluan kepada defendan pertama berdasarkan invois-invois di atas. Defendan seharusnya sekarang diestop daripada menyatakan bahawa mereka tidak terhutang kepada plaintif jumlah yang dituntut atau jumlah-jumlah lain. [lihat *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Sdn Bhd* [1995] 3 MLJ 331; *Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd* [1996] 2 MLJ 251; *Chong Yoong Choy v UOL Factoring Sdn Bhd* [1996] 2 CLJ 605] (lihat perenggan 19).

(6) Defendan-defendan telah gagal untuk mengemukakan sebarang butiran-butiran terhadap asas pertikaian mereka atas jumlah-jumlah yang dituntut oleh plaintif. Dan, mereka juga tidak menunjukkan dalam setiap keadaan, sebarang kesilapan nyata pada permukaan sijil keterhutangan. Dengan itu, mereka adalah terikat dengan kandungan-kandungan sijil [lihat *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363] (lihat perenggan 19).

(7) Kelakuan defendan pertama yang tidak mebuat sebarang aduan kepada plaintif berkenaan ketiadaan bayaran, dan hanya berlengah-lengah dan tidak membuat bayaran untuk jumlah yang didakwa telah tertunggak kepadanya sehinggalah tindakan ini difailkan telah menafikan tuntutan balas defendan pertama. Adalah amat membingungkan untuk diperhatikan kenapa defendan pertama memilih untuk mengabaikannya daripada mendapatkan kembali jumlah yang didakwa terhutang kepadanya (lihat perenggan 21).

(8) Defendan kedua tidak memberikan keterangan bagi dirinya atau bagi pihak defendan-defendan lain dan tidak juga dipanggil sebagai saksi dalam perbicaraan dalam aspek kes ini yang mempunyai tanggungan relevan untuk

penentuan mahkamah ini ke atas liabiliti. Dalam keadaan ini, mahkamah mungkin secara betul dan secara kehakimannya menyimpulkan bahawa jika saksi ini ada dan mempunyai dokumen-dokumen untuk dikemukakan, mereka akan memberikan keterangan berlawanan kepada kes defendan-defendan. Oleh itu, peruntukkan kesimpulan berlawanan di bawah s 114(g) Akta Keterangan 1950 adalah digunapakai terhadap defendan-defendan (lihat perenggan 21).]

Notes

For cases on failure to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 161–171.
For the case on estoppel, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2757.
For cases on statement of claim, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1544– 1578.

Cases referred to

Amanah Merchant Bank Bhd [formerly known as Amanah-Chase Merchant Bank Bhd] v Lim Tow Choon (through Official Assignee) [1994] 2 CLJ 1 (refd)
Sundaram v Chew Choo Khoon [1968] 2 MLJ 153 (refd)
Ban Hin Lee Bank Bhd v Jashbhai Nagjibhai Patel [1992] 1 CLJ 98 (refd)
KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 AMR 839 (refd)
Superintendent of Land and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185 (refd)
Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Sdn Bhd [1995] 3 MLJ 331 (refd)
Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd [1996] 2 MLJ 251 (refd
Chong Yoong Choy v UOL Factoring Sdn Bhd [1996] 2 CLJ 605 (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd (1995) 2 MLJ 363 (refd)
KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10 (refd)
Playings Cards (M) Sdn Bhd v China Mutual Navigation Co Ltd [1980] 2 MLJ 182 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 7(1)
Evidence Act 1950 s 114 (g)

Beatrice Loi (Nik Hussain & Partners) for the plaintiff.
L Parthiban (L Parthiban, Zulkiflee & Asociates) for the defendants.

Vincent Ng Kim Khoay J:

[1] This case proceeded to trial. At the outset of the hearing, both parties agreed to have all the documents in Part A and B of the Common Bundle of Documents (marked as IDB) admitted into evidence save that the contents of all the documents in Part B of IDB are admitted subject to cross-examination. After the hearing commenced on 10 November 2003, at which viva voce evidence was taken, the parties informed the court that they had agreed that the documents in Part B with

A their contents be also included in Part A of IDB with the exception of item 69 (p 270–271), item 70 (p 272), item 71 (p 273), item 72 (p 274), item 73 (p 275) and item 80 (p 283–284). The other documents are by consent marked as follows:

(a) Bundle of Pleadings — 'IP';

B (b) Agreed Issues — 'IFP';

(c) Witness Statement Affidavit under O 35A of the Rules of the High Court 1980 affirmed by Kheoh And Yeng — 'PW1-A':

(d) Witness Statement Affidavit affirmed by Lee Tin Choo — PW2-A; and

C (e) Witness Statement Affidavit affirmed by Vong Choy Tiow — 'DW-1-A'.

[2] For the first defendant and for himself, only the third defendant gave evidence. He was a 'lone ranger' in the defence to the claim so to say against the four defendants.

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[3] In this action, the plaintiff claims against the defendants, jointly and severally the sum of RM965,573.60 as at 31 January 1998 together with interest at the rate of 12.25% per annum commencing from 1 February 1998 until full realization and costs.

E BACKGROUND AND BRIEF FACTS

[4] The following facts are undisputed. One Invescor Ventures Sdn Bhd was the main contractor appointed to carry out the construction project for terrace factories and shop-office (the project) situated on the land held under Lot Nos 3526–3542 F Mukim Kota Tinggi, Daerah Kota Tinggi Johor. The main contractor appointed the first defendant as the sub-contractor for the project. The first defendant needed funds to complete the project and turned to the plaintiff for the same. By a letter of offer (see pp 1–4 of the IDB) dated 29th November 1996, the plaintiff offered a factoring facility to the first defendant, which was accepted by the first defendant on G 30th November 1996. On 16th December 1996, the plaintiff entered into a Factoring Agreement (see pp 7–44 of IDB) with the first defendant whereby the plaintiff was assigned the debts and invoices (the debt receivable) due to the first defendant (the Vendor) from the main contractor. The second, third and fourth defendants executed a Letter of Guarantee and Indemnity (see pp 43–54 of IDB) dated 11th December 1996 to secure the sums due to the plaintiff on the Factoring H Agreement. The main contractor was notified of the said Factoring Agreement by the first defendant vide Notice of Assignment dated 17th December 1996 (see pp 55–57 of the IDB). It was an agreed term between the plaintiff and the first defendant that the certification of the progress claims would be done by the main contractor (see p 6 of IDB). However, the main contractor defaulted in payment when the invoices I became due. As no payment was forthcoming from the main contractor, the plaintiff exercised its rights under the said factoring agreement requiring the first defendant to repurchase the debts outstanding from the main contractor. The requisite notices to repurchase the debts under cl 10 was sent by the plaintiff's solicitors vide letter dated 9th October 1997 to the first defendant (see pp 279 of the IDB), and subsequently the letters of demand was also sent vide registered post to the first defendant and to

the second, third and fourth defendants on 6th February 1998 and 7th February 1998 respectively (see pp 95–98 of the IDB). The proof of service is at pp 99–101 of IDB. The plaintiff took out proceedings and obtained judgment against the main contractor by way of Kuala Lumpur High Court Civil Suit No. D1–22–371–1998 (see p 176 of the IDB). The main contractor has since been wound up upon the petition of another creditor vide Shah Alam High Court's order dated 19th December 2000 (see p 249 of the IDB). To date hereof, the judgment sum remained unsettled.

[5] The defendants admitted that the main contractor had failed to pay progressive payments due to the plaintiff. However, the defendants insisted that all outstanding sums ought to be recovered from the main contractor and not from them. The defendants contended that under the said Factoring Agreement, all debts due to the first defendant from the main contractor have been assigned to the plaintiff and should have been paid by the main contractor upon the plaintiff's demand.

THE FIRST DEFENDANTS' COUNTER-CLAIM

[6] The first defendant has made a counter-claim against the plaintiff for the sum of RM231,454.12 together with interests on the ground of the alleged failure of the plaintiff to pay the first defendant the said sum in respect of the initial payment for invoice No. 005/97 (Schedule 006, being the 6th Schedule). The plaintiff denies that any amounts were payable to the first defendant and the first defendant was not short-changed on the initial payment.

ISSUES FOR THE COURT'S DETERMINATION

The parties submitted the following three agreed issues for this court's determination, namely:

(i) Whether the plaintiff had given proper and valid notice to the first defendant under cl 10(1) of the Factoring Agreement dated 16th December 1996 and to the second, third and fourth defendants in accordance with the terms of the Continuing Guarantee cum Indemnity dated 11th December 1996 before exercising any right of repurchase or recourse of the Purchase Invoices (First Issue);

(ii) Whether the plaintiff is entitled to the sum claimed in the Statement of Claim dated 25th February 1998 against all the defendants (Second Issue); and

(iii) Whether the first defendant is entitled to counter-claim against the plaintiff in respect of invoice No. 005/97 under the 6th Schedule (Third Issue).

i. First Issue

[7] The defendants' contention under this issue could be divided into two limbs: firstly, their denial of having received, the notice to repurchase and secondly, even if duly received the notice was not a proper notice. Counsel for the defendants in his submissions argued that the notice to repurchase or recourse in respect of each debt

must comply with all the provisions of cl 10 of the Factoring Agreement and that the solicitor's letters of demand (pp 95 to 98 of IDB) did not comply with this clause.

[8] In this regard, it is perhaps appropriate to first determine the meaning of the term 'recourse'. According to the *Factoring Law and Practice (2nd Ed) by Freddy Salinger*, 'recourse' means the right of the factor to be guaranteed the due payments of a purchased debt by the debtor or to have an unpaid debt repurchased by the client. In the case at hand, the plaintiff is the factor while the first defendant is the client.

[9] For ease of reference cl 10(1)(a) to (j) of the Factoring Agreement is reproduced and it reads:

10. Repurchase

(1) The purchaser (the plaintiff here) may in its discretion at any time after the occurrence of any the following events (but without limitation to other rights available to it hereunder) give the vendor (the first defendants here) notice to repurchase any debt which the purchaser has purchased from the vendor:

(a) if the main contractor shall dispute the validity of or the amount payable in respect of that purchase debt; or

(b) if the Main Contractor shall institute proceedings to rescind or claim damages for breach of the contract under which that purchased debt arises; or

(c) if the Main Contractor makes a counter-claim or raises a set-off in answer to a claim for that purchase debt; or

(d) if without obtaining the purchaser's prior written consent the vendor waives or modifies any terms of the contract in respect of that purchase debt; or

(e) if the vendor commits a breach of any term of the related contract; or

(f) if the vendor commits a breach of any term of this agreement relating to the sale and purchase of any debt;

(g) if the main contractor or the vendor or any of the vendor's sureties becomes insolvent;

(h) if the main contractor fails promptly to pay that purchased debt when it becomes due;

(i) if that contract in respect of which the purchased debt arises is or becomes illegal or unenforceable in whole or in part as a result of any law regulations or any directive of any appropriate authority having jurisdiction over such transaction; or

(j) if the purchaser is of the opinion that its position in respect of such purchased debt is insecure or in jeopardy.

Further clause 10(2) and (3) of the Factoring Agreement provides:

(2) Upon receipt of the foregoing notice, the vendor must, without question, purchase that debt from the purchaser at a repurchase price that would fully indemnify the purchaser against all payments, expenses, costs, and consequential losses (including loss of income or profits) in respect of the purchase of such debt and in the event that there is a Bank Participation Agreement the vendor shall repay the Bank all sums advance by the Bank in respect of such debt.

(3) The ownership of every debt the subject of recourse or repurchase shall remain vested in the purchaser until the repurchase price has been fully discharged.(emphasis added)

[10] On whether proper notice was given to the defendant, during cross-examination, when PW1 was specifically referred to p 74 (invoice 002/97), p 80 (invoice 003/97), p 86 (invoice 004/97) and p 92 (005/97) of IDB he said that 'I confirm that all invoices were not settled by Invescor within the 120 days. There was no individual notices to repurchase in respect of these four invoices. But the notice for recourse or repurchase of these invoices was given collectively with the third invoice vide the letter dated 9th October 1997 (p 279 of IDB)'. Further, in his testimony during cross-examination, DW1 confirmed that he received all the demand letters dated 6th February 1998 and 7 February 1998 respectively as exhibited in pp 95 to 98 of IDB. He said: 'I admit having received the letters from plaintiff's solicitors as shown in IDB 95 to 98'.

[11] In the circumstances, it is this Court's finding that defendants did receive the notice to repurchase dated 9th October 1997 as exhibited in IDB p 279) issued by the plaintiff's solicitors, since the recourse or repurchase of the four invoices was done collectively together with the third invoice. This notice to repurchase was further buttressed by notices dated 6th February 1998 and 7th February 1998 (as exhibited in 1DB pp 95 to 98) which demanded payments for the sum of RM965,573.60 as at 31st January 1998 together with interest thereon within 14 days from the date of the notice of demand. On the question whether such notice is valid, the defendants' contention is that the notices issued by the plaintiff's solicitors amounts to letters of demand to proceed with legal action only and no more. They further said that the reason or reasons stipulated in cl 10(1)(a) to (i) must be stated in the notice to repurchase for the same to be valid. And, that the failure to state in the notice the reason, the purchase price and the particular invoice that the plaintiff wants the defendants to repurchase had resulted in the notice of repurchase being not the requisite notice pursuant to cl 10(1) of the factoring agreement. This Court rejects this point of contention of the defendants' counsel. The reason being, and I hold, that the notice of 9th October 1997 (p 279 of IDB) is in fact a good notice to repurchase and is in compliance with cl 10(1). It is crucial to note cl 10(2) and (3) imposes a clear obligation on the part of the first defendant that 'upon receipt of the notice (issued under cl 10 (1)), the vendor must without question, purchase that debt from the purchaser at a repurchase price that would fully indemnify the purchaser against all payments, expenses, costs and consequential losses.' Further, under cl 10(i),(g) and (h), the first defendant shall be liable 'if the main contractor (becomes insolvent or) fails promptly to pay that purchased debt when it becomes due'. Notably, cl 10(1) imposes no obligation upon the purchaser (the plaintiff) to state the particulars and details required by the defendants. In any event, there was no contemporaneous protest in this regard by the defendants. The notice of 9th October 1997, which was followed by all the four demand notices vide registered letters [pp 95 to 98 of IDB] addressed to the defendants, were sent by the plaintiff's solicitors by registered posts as well as by ordinary posts to the last known addresses of each of the defendants and the proof of posting of same are as exhibited in pp 99 to 101 of IDB. This is in due compliance with cl 30(2) of the factoring agreement (p 35 of IDB) and cl 18 of the Continuing Guarantee cum Indemnity (p 51 of IDB) [see Amanah Merchant Bank Bhd [formerly known as *Amanah-Chase Merchant Bank Bhd v Lim Tow Choon (through Official Assignee)* [1994] 2 CLJ 1.

[12] It is pertinent to note that in their defences the defendants had admitted that the main contractor had failed to make payment to the plaintiff. Further, in his witness statement (in averment No. 12 of 'DW1-A') DW1 admitted that if the main contractor should fail, neglect and/or refuse to pay the debt to the plaintiff upon issuance and receipt of the notice for the repurchase of the debt to the defendants, than the defendants must repurchase the said debt from the plaintiff at a repurchase price that would fully indemnify the plaintiff. He also admitted (in averment No. 19 of 'DW1-A') that he came to know that the main contractor had failed to pay progressive payments due to the plaintiff, in the sum of RM1,809,486.90, as legal action had been taken against the main contractor. It is an undisputed fact that after being served with the notice to repurchase, the defendants did not at any time raise any protest that the amount demanded is incorrect or that no amount is due and payable to the plaintiff under the agreement. Thus, by the defendants' silence they are estopped from now raising this challenge as the plaintiff was lulled into the belief that the defendants did not intend to challenge the existence of a demand to repurchase the debt, or the correctness of the amount owed by the defendants under the Factoring Agreement.

[13] In the case of *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 AMR 839, His Lordship Gopal Sri Ram speaking for the Court of Appeal held as follows:

> The evidence also indicates that the appellant did receive the statements of accounts and in fact held on them. By the appellant's silence, and bearing in mind the other circumstances of this case, the respondent was lulled into the belief that the appellant did not intend to challenge the existence of a prior legal relationship to challenge the amount owed by the appellant.

[14] On the defendants' question regarding the value that would fully indemnify the plaintiff should they repurchase the debt from the first defendant, the short answer to that could be found in pp 95 to 98 of IDB where the contents have been admitted, namely the sum of RM965,573.60 as at 31st January 1998 together with interest thereon at the rate of 12.25% per annum and late payment charges of 1% per annum. In summing up, it is this Court's finding that the recourse or repurchase of the four invoices was done collectively (together with the third invoice) by the letter dated 9th October 1997 (p 279 of IDB) which were subsequently followed by letters of demand dated 6th February 1998 and 7th February 1998 (pp 95 to 98 of IDB), coupled with their respective proof of service, all of which constituted notices to repurchase the debts, issued by the plaintiff's solicitors. Surely, it is inconsequential in the law of factoring agreements whether such notices to repurchase are issued by the purchaser or its lawyers. The defendants' contention on the first issue is untenable and without any merit whatsoever.

ii. Second Issue

[15] The defendants has also taken issue that the plaintiff had failed in paras 5, 6, 7, 8 and 9 of the statement of claim to give particulars of claim or to disclose any cause of action against them. And, that the statement of claim did not reveal whether the alleged sum of RM965,573.60 was based on a claim for recourse or repurchase of debt against the first defendant, and how this sum is owed by the defendants. And,

that failure to plead material facts in the pleadings would leave the court with no alternative but to dismiss the claim. It is trite law that parties should only plead material facts and not evidence (see O 18 r 7 of the Rules of the High Court 1980) in their pleadings. In *Superintendent of Land and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185, Peh Swee Chin SCJ when delivering the judgment of the court, set out the underlying rationale on the application of O 18 r 7(1) as follows:

> The underlying well-known rationale for requiring material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence, if allowed, will prejudice and embarrass or mislead the opposing party.
>
> If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the court, and the court will then uphold such timely objection. The court will generally however grant an adjournment if requested, on suitable terms as to costs etc for the pleading to be amended by the party seeking to adduce such evidence. One must bear in mind the need for an orderly adversary system of a court trial, not a chaotic harangue in a market place.

[16] A somewhat similar view was expressed by Raja Azlan Shah CJ (as he then was) in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 at p 12:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been properly excluded.

[17] In another earlier case, *Playings Cards (M) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182, Abdoolcader J said that:

> although the pleadings in this case were not very precise, both parties knew the case presented by the other and justice required that the substantive issue between the parties be considered. The appellant's claim in this case was in effect for delay in the delivery of the goods.

[18] It is my judgment that the plaintiff's claim has been adequately pleaded in the statement of claim as read with the reply and defence to the counter-claim. The plaintiff has pleaded all the material facts namely: the existence of a Factoring Agreement between the plaintiff and the first defendant, which was guaranteed by the second, third and fourth defendants; the material terms of the agreement and, the failure of the defendants to comply with the notices to repurchase. To plead anything more would be tantamount to pleading evidence [see also *Sundaram v Chew Choo Khoon* [1968] 2 MLJ 153, *Ban Hin Lee Bank Bhd v Jashbhai Nagjibhai Patel* [1992] 1 CLJ 98].

[19] Through PW1's evidence, copies of invoices (see pp 68, 74, 80, 86 and 92 of IDB) and certificate of indebtedness (see pp 270 to 275 of IDB) was tendered by the plaintiff to prove the sums outstanding and payable to the plaintiff by the defendants.

Each of the invoices also bear a clear statement that any objection to the bills or its items must be notified to them in writing within 14 days of its receipt, failing which the bills would be deemed final and conclusive against the main contractor. Consequently, these invoices are deemed good for payment as there was no objection from the main contractor within the stipulated period. More importantly, the plaintiff had acted to its detriment in releasing the initial payments to the first defendant based on the aforesaid invoices. The defendants ought now to be estopped from stating that they do not owe the plaintiff the sum claimed or any other sums (see Boustead Trading (1985) *Sdn Bhd v Arab Malaysian Merchant Bank Sdn Bhd* [1995] 3 MLJ 331; *Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd* [1996] 2 MLJ 251; *Chong Yoong Choy v UOL Factoring Sdn Bhd* [1996] 2 CLJ 605]. It is also of material bearing to note that the defendants failed to condescend upon any particulars as to the basis of their dispute on the sums claimed by the plaintiff. And, neither did they show in any manner, any manifest error on the face of the Certificate of Indebtedness. Hence, they are bound by the contents of the Certificate [see *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363]. Based on the foregoing reasons I am entirely satisfied that the plaintiff has provided sufficient proof of the sum claimed and is entitled to the same, and I find the testimony of DW1 to be unworthy of credit.

iii. Third issue: on the counter-claim

[20] It was only on 11th September 2006 that the precise nature of this counter-claim was clarified by a formal amendment to the pleadings. The first defendant counter-claimed against the plaintiff for the sum of RM231,454.12 together with interests on the ground that the plaintiff had failed to pay the first defendant the initial payment of RM231,454.12, being 70% of RM330,648.72 in invoice No. 005/97 (Sch 006, being the 6th Schedule) and it was thus deprived of the use of the said sum, together with interest still due and owing thereon. The plaintiff, in its reply and defence to the counter-claim, averred that the first defendant was at all times aware of the particulars of invoices that have been issued by themselves (the first defendant) in the name of Invescor Ventures Sdn Bhd, which were assigned to the plaintiff, namely as follows:

Particulars of Invoices

	Amount
Invoice No. 001/97 (Sch 002, the second Schedule)	RM 762,251.56
Invoice No. 002/97 (Sch 003, the third Schedule)	RM 527,141.69
Invoice No. 003/97 (Sch 004, the fourth Schedule)	RM 268,980.15
Invoice No. 004/97 (Sch 005, the 5th Schedule)	RM 420,464.75

Invoice No. 005/97 (Sch 006, the 6th Schedule) A

RM 330,648.75

RM 2,309,486.90

[21] The plaintiff had made initial payments to the first defendant on invoices Nos. 001/97, 002/97, 003/97 and 004/97 amounting to RM 1,675,000.00. However, as for invoice No. 005/97 (6th Sch), the plaintiff did not make any initial payment since the accumulated arrears on all invoices assigned to the plaintiff was in the region of RM 2,309,486.90, the whole of which amount the main contractor, Invescor Ventures Sdn Bhd, had failed to meet in toto. Further, PW-1 in her evidence testified that the plaintiff had the discretion to decide whether to make the initial payment and how much to pay out on each purchase based on the strength of the invoices purchased and the conduct of the main contractor in making the payments. PW-1 had testified that on the date of the purchase of Invoice No. 005/87 in the 6th Schedule (Sch 006) on 14th May 1997, the plaintiff took into consideration that the second schedule (Sch 002) was also then due and outstanding on the same date 14th May 1997, in respect of which no payment had been made by the main contractor. In this regard, the fact that the payment under the third schedule (Sch 003) had also fallen due on 29th May 1997, would show the adverse conduct of the main contractors. Furthermore, the main contractor did not then settle the amount due in the first schedule (Sch 001) satisfactorily in that M/s Invescor Ventures (the main contractor) made final payment on 19th April 1997, whereas the due date was on 13th April 1997. Consequently, due to the main contractor's default the plaintiff decided not to make any initial payment on invoice No. 005/97 (Sch 006). Based on those facts, I find that the plaintiff has not breached the provisions of the Factoring Agreement. I would also hold that the first defendant's conduct in not complaining to the plaintiff about the non-payment, and in sitting idle and not pursuing the payment of the alleged sum due to it until after the filing of this action, would negate the first defendant's counterclaim. It is puzzling to observe why the first defendants chose to ignore pursuing the sum allegedly due to it. My grounds for accepting the plaintiff's version is fortified by the DW1's own admission in his evidence that the first defendant would have stopped work if any of the invoices had not been paid to it, but yet the works still continued. It is unfortunate to note that the second defendant did not give evidence for himself or on behalf of the other defendants, nor was he called as a witness in the trial on this aspect of the case which has a relevant bearing to the court's determination on liability. In the circumstances the Court may properly and judicially infer that if this witness had been made available and had the documents been tendered, they would have offered evidence adverse to the defendants' case. As such, the adverse inference provision under s 114(g) of the Evidence Act 1950 is invoked against the defendants.

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[22] Lastly, the first defendant had also contented that, if at all there was any breach, on account of the non-payment of the dues to the plaintiff, it is the first defendant's main contractor, Invescor Ventures Sdn Bhd who is in breach and not the first defendant. This particular contention obviously cannot be sustained simply because, in faithful compliance with cl 10 of the Factoring Agreement, the plaintiff, did indeed exercise its right to repurchase or recourse against the first defendant.

I

Clearly, right from the outset, the first defendant's counter-claim could not be sustained and should be dismissed with costs.

CONCLUSION ON THE CLAIM AND COUNTER-CLAIM

[23] After having read the cause papers and carefully considered the oral and documentary evidence from both sides, I have decided to, and now do, allow the plaintiff's claim with costs in terms of prayer 9(a), (b) and (c) of encl 1 and dismiss the first defendant's counter-claim also with costs.

Plaintiff's claim allowed with costs and defendant's counter-claim dismissed with costs.

Reported by K Krishnan